Twin Advance (M) Sdn Bhd v Polar Electro Europe BV

HIGH COURT (PULAU PINANG) — ORIGINATING SUMMONS NO 24–2292–12 OF 2011
CHEW SOO HO JC
7 AUGUST 2012

Arbitration — Award — Setting aside — Whether s 37 of the Arbitration Act 2005 ('Act') could be invoked to set aside arbitration award made outside Malaysia — Whether using s 37 in such manner would violate the Act and parties' express agreement over place of arbitration — Whether inherent jurisdiction of court could alternatively be invoked to set aside foreign arbitration award

The plaintiff and the defendant had consensually arbitrated a dispute in Singapore. In the instant originating summons ('the summons') the plaintiff sought to set aside the arbitration award ('the award') pursuant to s 37 of the Arbitration Act 2005 ('Act'). The defendant applied to strike out the summons under O 18 r 19(1) of the Rules of the High Court 1980 on the ground the High Court in Malaysia had neither inherent jurisdiction nor jurisdiction under the Act to set aside the Singapore-made award. The plaintiff argued that since ss 38 and 39 of the Act gave the court jurisdiction to recognise and enforce arbitration awards made both domestically and by a foreign state, s 37 should, by analogy, allow the court to set aside an award which had been made outside Malaysia. The defendant, however, said that since s 3 of the Act expressly provided for the application of the Act only to domestic and international arbitrations where the seat of arbitration was in Malaysia, it followed that s 37 could not be invoked to set aside an award made outside Malaysia.

Held, allowing the defendant's application and striking out the originating summons with costs:

(1) Section 37 of the Act was applicable to an arbitral award where the seat of arbitration was in Malaysia but not where the seat was outside Malaysia. The inherent jurisdiction of the court also ought not to be invoked to intermeddle with the jurisdictional aspect of arbitration nor to allegedly do justice in the instant case when there was in fact no injustice as the plaintiff was at liberty to apply to the Singapore High Court to set aside the award made in Singapore (see para 41).

(2) The intention of the Act was amply clear that ss 38 and 39 were to be construed as exceptions to s 3 of the Act and distinct and separate from s 37. If s 37 included the setting aside of an arbitral award of a foreign State the Legislature would have provided such express words in the

section. In the absence of such express provision, the principle of law that the seat of arbitration was the place where challenges to an award were made remains applicable and good law (see para 28).

(3) The court should exclude its general or residual powers or inherent jurisdiction to indirectly vary the substantive provisions of the Act. The seat or place of arbitration was intended and contractually agreed upon by the parties to be in Singapore. They must be taken to have chosen Singapore as the jurisdiction for any subsequent proceedings to challenge the award. It was not the court's role or function to rewrite their contract by converting the seat from Singapore to Malaysia (see para 39).

(4) It was inconsistent with the Act's intent and purpose of achieving consistency between the international and domestic arbitral regimes if it departed from the internationally entrenched principle that the right to challenge an arbitral award, as distinct from the recognition of arbitration agreements and recognition and enforcement of arbitral awards, ought to be in the courts of the place of arbitration (see para 37).

[Bahasa Malaysia summary

Plaintif dan defendan telah secara persetujuan bersama menimbang tara satu pertikaian di Singapura. Melalui saman pemula ('saman') plaintif memohon untuk mengetepikan award timbang tara ('award tersebut') berikutan s 37 Akta Timbangtara 2005 ('Akta'). Defendan memohon untuk membatalkan saman tersebut di bawah A 18 k 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980 atas alasan bahawa Mahkamah Tinggi di Malaysia tidak mempunyai bidang kuasa sedia ada atau bidang kuasa di bawah Akta 2005 untuk mengetepikan award yang diberikan di Singapura. Plaintif menghujah bahawa oleh sebab ss 38 dan 39 Akta emberikan mahkamah bidang kuasa untuk mengiktiraf dan melaksanakan award timbang tara yang dibuat dalam negara dan di negara asing, s 37 wajar, secara analogi, membenarkan mahkamah mengetepikan award yang telah dibuat di luar Malaysia. Defendan, walau bagaimanapun, menyatakan bahawa oleh sebab s 3 Akta secara langsung memperuntukkan pemakaian Akta tersebut hanya bagi timbang tara dalaman dan antarabangsa di mana timbang tara bersidang di Malaysia, maka s 37 tidak boleh dibangkitkan untuk mengetepikan award yang dibuat di luar Malaysia.

Diputuskan, membenarkan permohonan defendan dan membatalkan saman permula dengan kos:

(1) Seksyen 37 Akta adalah beraplikasi kepada award timbang tara di mana timbang tara bersidang di Malaysia tetapi bukan di mana ia bersidang di luar Malaysia. Bidang kuasa sedia ada mahkamah juga tidak boleh dibangkitkan untuk campur tangan dengan aspek bidang kuasa timbang tara atau untuk kononnya melakukan keadilan di dalam kes ini apabila sememangnya tidak ada ketidakadilan kerana plaintif mempunyai

kebebasan untuk memohon ke Mahkamah Tinggi Singapura untuk mengetepikan award yang dibuat di Singapura (lihat perenggan 41).

(2) Niat Akta adalah amat jelas bahawa ss 38 dan 39 adalah ditafsirkan sebagai pengecualian kepada s 3 Akta dan berbeza dan berasingan daripada s 37. Jika s 37 termasuk pengenepian award timbang tara negara asing, Perundangan akan memperuntukkan sedemikian secara langsung di dalam seksyen tersebut. Dalam ketiadaan peruntukan langsung yang sedemikian, prinsip undang-undang adalas bahawa tempat di mana timbang tara bersidang adalah tempat di mana cabaran kepada award boleh dibuat kekal beraplikasi sebagai undang-undang yang matan (lihat perenggan 28).

(3) Mahkamah tidak boleh mengetepikan kuasa umum atau kuasa baki atau bidang kuasa sedia ada untuk mengubah secara tidak langsung peruntukan substantif Akta. Tempat timbang tara bersidang diniatkan dan secara kontrak dipersetujui oleh pihak-pihak untuk dibuat di Singapura. Mereka sepatutnya dianggap sebagai telah memilih Singapura sebagai bidang kuasa untuk apa-apa prosiding seterusnya untuk mencabar award tersebut. Bukan peranan dan fungsi mahkamah untuk menulis semula kontrak mereka dengan mengubah persidangan daripada Singapura ke Malaysia (lihat perenggan 39).

(4) Ia tidak konsisten dengan niat dan tujuan Akta 2005 untuk mencapai kekonsistenan di antara regim timbang tara antarabangsa dan dalam negeri jika ia bercanggah dengan prinsip antarabangsa yang kukuh bahawa hak untuk mencabar award timbang tara, sebagai berbeza daripada pengiktirafan perjanjian timbang tara dan pengiktirafan dan penguatkuasaan award timbang tara, wajar dibuat di mahkamah di mana timbang tara bersidang (lihat perenggan 37).]

Notes

For cases on getting aside, see 1(1) *Mallal's Digest* (2012) paras 1749–1820.

Cases referred to

A v B [2007] 1 Lloyd's Rep 237 (refd)

A v R [2010] 3 HKC 67, CA (refd)

Aras Jalinan Sdn Bhd v TIPCO Asphalt Public Company Ltd & Ors [2008] 5 CLJ 654, HC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Bishop of Gloucester v Cunnington [1943] KB 101, CA (refd)

C v D [2007] EWCA Civ 1282; [2008] 1 All ER (Comm) 1001; [2008] 1 Lloyd's Rep 239, CA (refd)

Corporacion Transnacional de Inversiones, SA de CV v STET International, SpA [1999] OJ No 3573, SC (refd)

Government of India, The v Cairn Energy India Pty Ltd & Anor [2011] 6 MLJ 441, FC (folld)
International Associated Co (Pte) Ltd v Chief Assessor, Singapore [1980] 2 MLJ 110 (refd)
Klockner Industries-Anlagen GMBH v Kien Tat Sdn Bhd & Anor [1990] 3 MLJ 183, HC (refd)
Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd [2010] 2 MLJ 23, FC (refd)
Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush & another (2004) 2 SLR 14, HC (refd)
Ngo Chew Hong Oils & Fats (M) Sdn Bhd v Karya Rumpun Sdn Bhd [2009] MLJU 1335, HC (refd)
Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors [1988] 1 MLJ 178, SC (refd)
Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd & Ors [1998] 2 MLJ 20, CA (refd)
Seaford Court Estates Ltd v Asher [1949] 2 KB 481, CA (refd)
Soilchem Sdn Bhd v Standard-Elektrik Lorenz AG [1993] 3 MLJ 68, HC (refd)
Xiamen Xingjingdi Group Ltd v Eton Properties Ltd [2008] 6 HKC 287 (refd)

Legislation referred to

Arbitration Act [SG] s 3
Arbitration Act 1950 [UK]
Arbitration Act 2005 ss 2, 3, 8, 37, 37(1)(a), 38, 39, 39(1)(a)(iii), (vii)
Rules of the High Court 1980 O 18 r 19(1)(a), (b), (d)

Lim Choon Khim (Chooi, Saw & Lim) for the plaintiff.
Lim Chee Wee (Lee Shih with him) (Skrine) for the defendant.

Chew Soo Ho JC:

INTRODUCTION

[1] This originating summons ('OS') was filed by the plaintiff for the prayers, inter alia, to set aside an arbitration award involving the parties herein made in Singapore with the English law as the governing law pursuant to the joint venture contract of the parties when dispute between them arose. From the intitulement, the plaintiff's OS is made under s 37 of the Arbitration Act 2005 ('the AA 2005'). The defendant filed this application vide summons in chambers (encl 6) dated 20 January 2012 to strike out this OS under O 18 r 19(1)(a)–(b) or (d) of the Rules of the High Court 1980 on the following deduced grounds:

(a) this court has no jurisdiction under the Arbitration Act 2005 to set aside

an arbitration award where the seat or place of arbitration is outside Malaysia ie in Singapore in this case for which it was contended that the High Court of Singapore should be the proper court of jurisdiction to hear such an application; and

(b) there is no inherent jurisdiction which allows for any setting aside of an arbitration award.

[2] The defendant contended that this is a plain and obvious case for the process of striking out basically on a question of law and/or interpretation of the Arbitration Act 2005.

THE BRIEF FACTS

[3] The plaintiff, the defendant and a Netherland company known as Finnish Fund For Industrial Cooperation Ltd ('Finn-Fund') had entered into a joint venture agreement ('JVA') on 11 November 1998 to incorporate a company known as Polar Twin Advance (M) Sdn Bhd ('PTA') in Malaysia.

[4] On 22 August 2002, a supplemental agreement to the JVA was entered to vary the shareholdings among the three shareholders.

[5] Article 16 of the JVA states that the JVA shall be governed and construed in accordance with the English law while article 17 provides, inter alia, that any dispute or difference which cannot be settled amicably between the parties shall be finally settled by arbitration, the seat of arbitration shall be Singapore or such other place as the parties may unanimously agree and the decision of the arbitrator shall be final and binding on the parties. The defendant alleged that the plaintiff had committed serious repudiatory and/or fundamental breaches of the JVA and thereby terminated the JVA vide letter dated 13 January 2009.

[6] On 3 March 2009, the defendant initiated arbitral proceedings against the plaintiff in the ICC International Court of Arbitration which appointed Mr Kay — Jannes Wegner as the sole arbitrator to hear the arbitration in Singapore. The arbitral proceedings had accordingly proceeded on in Singapore and ended with the final award being published on 5 September 2011 by the arbitrator for which the plaintiff seeks to set aside.

THE EVALUATION AND FINDINGS

[7] The facts of the case as recapitulated in brief above are not disputed by the parties. The sole issue as reflected in the grounds in encl 6 is on the question of jurisdiction whether our AA 2005 empowers this court to set aside an award where the seat of arbitration as agreed by the parties herein is outside Malaysia

and if this court has presumably no jurisdiction, then can this court invoke its inherent jurisdiction to entertain such an application to set aside the said award made in Singapore?

[8] Before embarking onto the intention of Parliament on the AA 2005 which replaces the former Arbitration Act 1952 enacted basing virtually on the 1950 English Arbitration Act and since our AA 2005 has in fact adopted the Model Law 1985 ('the Model Law') of the United Nations Commission on International Trade Law (UNCITRAL), it is conducive to note how the Model Law and/or other jurisdictions which similarly adopt the Model Law have approached the issue of seat of arbitration in order to be able to appreciate the intention of the Legislature in enacting AA 2005 particularly the provision of setting aside an award where the seat is outside Malaysia. In the cited case of *Aras Jalinan Sdn Bhd v TIPCO Asphalt Public Company Ltd & Ors* [2008] 5 CLJ 654, Justice Badariah Sahamid JC (as she then was) has dwelt on the historical aspect and the rationale of our AA 2005 which I find no necessity for any further elaboration save to echo her words on the rationale as follows:

> The rationale was briefly, to have a single reference point for both domestic and foreign arbitrations as well as to promote consistency between international and domestic arbitral regimes. The rationale underlying Model Law is to set the parameters within which courts have jurisdiction to assist or supervise arbitration, as well as to support party autonomy in international commercial arbitration. The move from the 'English model' to Model Law also reflects an appreciation of the need to adopt an arbitral regime that reflects worldwide consensus on principles and practices of international arbitration …

[9] Thus, it can be seen that the rationale of our AA 2005 has a wider perspective than before in that it does take into consideration the 'world wide consensus on principles and practices of international arbitration' for which I am of the view that conceivably the AA 2005 will not enact provisions to run contrary to such international consensus with that backdrop in mind.

[10] The extent of court intervention in matters governed by the Model Law as in AA 2005 seems limited. Article 5 of the Model Law provides that:

> In matters governed by this law, no court shall intervene except where so provided in this law.

[11] Section 8 of the AA 2005 which has similar effect reads:

> Unless otherwise provided, no court shall intervene in any of the matters governed by this Act.

[12] The effect of such provisions restricting court intervention to what has

been so provided in the Model Law (or the AA 2005) is as stated in The Arbitration Act 2005 UNCITRAL Model Law as applied in Malaysia by Sundra Rajoo and WSW Davidson, Sweet & Maxwell Asia 2007 at p 33 citing Heltzmann and Neuhaus, *Guide to the UNCITRAL Model Law on International Arbitration: Legislative History & Commentary* (1994 Kluwer) that:

> It (the provision) merely requires that any instance of court involvement be listed in the model law. Its effect would, thus, be to exclude any general or residual powers given to the courts in a domestic system which are not listed in the model law.

[13] To put it briefly, the court intervention in matters relating to arbitration as provided by the Model Law as well as in the AA 2005 is limited to what is provided therein and that the court should not exercise any general or residual powers in a domestic system not listed in the Model Law. This, as explained by the UNCITRAL secretariat on the Model Laws on International Commercial Arbitration vide its explanatory note at p 18 para 14 indicates that:

> … there exists a trend in favour of limiting court involvement in international commercial arbitration. This seems justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and, in particular in commercial cases, prefer expediency and finality to protracted battles in court.

[14] In our Malaysian context in this respect, the Rt Hon Chief Justice of Malaysia, YAA Tun Arifin Zakaria, in his officiating address in conjunction with the launch of *KLRCA Fast Track Rules* (2nd Ed 2012), on 27 February 2012 at Mandarin Oriental Hotel, Kuala Lumpur has alluded the judiciary's remark on the new AA 2005 and the support for arbitration in the following:

> (19) Significantly, arbitration in Malaysia and across the Asia Pacific region has experienced remarkable growth due to the fact that arbitration awards are enforceable in 146 countries that are signatories to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards …
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> …
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> (22) Furthermore, with the amendments to the Arbitration Act 2005 that came into force in July 2011, the Courts are more receptive and ready to respect the parties' choice to go for arbitration, to further an arbitration agreement and to grant stay of proceedings for the matter to be referred to arbitration.
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> …
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> (24) Indeed, Section 8 of the Act states in clear terms that 'No court shall intervene in matters governed by this Act, except where so provided in this Act'.

(25) Meanwhile, Section 38 of the Act stated that 'On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia, or an award from a foreign state shall, subject to this section and Section 39 be recognized as binding and can be enforced by entry as a judgment in terms of the award or by action.

(26) These new provisions greatly exemplify how the Judiciary recognizes and supports arbitration in order to provide satisfactory resolutions to disputes'.

[15] On the seat of arbitration as referred to by YAA Tun Arifin Zakaria CJ vide ss 38–39 of the AA 2005, I shall consider them along with s 37 of the AA 2005 which is the provision of setting aside of an arbitral award after deliberating on the approach taken on the issue of seat of arbitration which parties have submitted.

[16] Article 1(2) of the Model Law provides that:

(2) The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.

[17] The explanatory note by the UNCITRAL secretariat explained vide para 12 as follows:

12. Another aspect of applicability is what one may call the territorial scope of application. According to article 1(2), the Model Law as enacted in a given State would apply only if the place of arbitration is in the territory of that State. However, there is an important and reasonable exception. Article 8(1) and 9 which deal with recognition of arbitration agreements, including their compatibility with interim measures of protection, and article 35 and 36 on recognition and enforcement of arbitral awards are given a global, i.e. they apply irrespective of whether the place of arbitration is in that State or in another State and as regards articles 8 and 9, even if the place of arbitration is not yet determined.

[18] This explanatory note is clear enough to depict that the applicability of the Model Law to a state is limited unless the seat or place of arbitration is in the territory of that state save for recognition of arbitration agreements and the recognition and enforcement of arbitral awards.

[19] Learned counsel for the plaintiff in objecting this application to strike out the plaintiff's OS herein, submitted that this court has the jurisdiction relying on s 37 of the AA 2005 which he submitted does not confine the court's jurisdiction to only an award of a domestic arbitration drawing an analogy from s 39 of the AA 2005 where the grounds stated therein are almost identical with the grounds contained in s 37. Since s 39 gives the court the jurisdiction

to recognise and enforce an international award, s 37, it is submitted, should also empower the court to strike out an international award citing the case of *Ngo Chew Hong Oils & Fats (M) Sdn Bhd v Karya Rumpun Sdn Bhd* [2009] MLJU 1335 which held, inter alia, that 'the failure to make an application to set aside the award may be fatal' when 'reading s 37 and 39(1)(a)(iii), the person opposing the leave for registration of the award must simultaneously apply to court to set aside the award. Mere filing of affidavit, opposing the registration may not be sufficient'. I pause to say that in so far as it concerns the issue of the seat of arbitration, *Ngo Chew Hong*'s case is not relevant as it does not relate or decide on such issue. Moreover, *Ngo Chew Hong*'s case involves an arbitral award where the seat is in Malaysia.

[20] Learned counsel for the defendant by referring to s 3 of the AA 2005 submitted that the AA 2005 shall only apply to arbitrations held in Malaysia. Since s 3 only mentions domestic and international arbitrations where the seat is in Malaysia, by the canon of statutory interpretation vide the maxim *unius exclusion alterius* (the express mention of one thing is the exclusion of another), s 37 which falls under Part II of the AA 2005 and which s 3 states that it does not apply to an international arbitration where the seat of arbitration is outside Malaysia, is not applicable to international arbitration award for the purpose of having it set aside in the High Court in Malaysia.

[21] On the back ground of our AA 2005 in consonant with the Model Law of UNCITRAL coupled with the underlying rationale of both the Model Law and the AA 2005 as briefly stated above, I shall proceed to consider the related provisions in the AA 2005 to ascertain particularly whether s 37 of the AA 2005 is applicable to set aside an international arbitral award where the seat of arbitration is outside Malaysia, drawing analogy from or referring to ss 38–39 of the AA 2005 as YAA Tun Arifin Zakaria CJ has cited above.

[22] Section 3 of the AA 2005 provides:

> 3 (1) This Act shall apply throughout Malaysia.
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> (2) In respect of a domestic arbitration, where the seat is in Malaysia —
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> (a) Parts I, II and IV of this Act shall apply; and
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> (b) Part III of this Act shall apply unless the parties agree otherwise in writing.
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> (3) In respect of an international arbitration, where the seat of arbitration is in Malaysia —
>
> (a) Parts I, II and IV of this Act shall apply; and
>
> (b) Part III of this Act shall not apply unless the parties agree otherwise in writing.

(4) For the purposes of paragraphs (2)(b) and (3)(b), the parties to a domestic arbitration may agree to exclude the application of Part III of this Act and the parties to an international arbitration may agree to apply Part III of this Act, in whole or in part.

[23] The emphasis discerned from s 3 above is that the AA 2005 is applicable whether the arbitration is domestic or international if the seat or place of arbitration is in Malaysia but it is silent in respect of arbitration where the seat is outside Malaysia. Reading s 3 in isolation, it appears to this court that the defendant's contention has merit in that the AA 2005 does not apply where the seat of arbitration is outside Malaysia since the AA 2005 does not provide so, referring to s 8. However, s 3 must be read as the general provision which does not affect the special provisions as in ss 38–39 which relate to recognition and enforcement of arbitral awards in respect of a domestic arbitration or an award from a foreign state or international award which is in line with the Model Law of UNCITRAL. The maxim *generlia specialibus non derogant* (general words or provisions do not affect special words or provisions) is aptly applicable; see *Bishop of Gloucester v Cunnington* [1943] KB 101; *International Associated Co (Pte) Ltd v Chief Assessor, Singapore* [1980] 2 MLJ 110. Thus, for an arbitral award where the seat is outside Malaysia, s 3 can be construed as to render such an award inapplicable under the AA 2005 unless the provisions of the AA 2005 specifically provide for, such as ss 38–39. This is squarely consistent with the Model Law article 1(2) as explained by the UNCITRAL secretariat vide the Explanatory note.

[24] Section 37 of the AA 2005 states:

37(1) An award may be set aside by the High Court only if —

(a) The party making the application provides proof that —

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration, or Arbitration 29;

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such

agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(b) The High Court finds that —

(i) the subject — matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

…

[25] Section 38 of the AA 2005 provides:

38(1)On an application in writing to the High Court, *an award made in respect of a domestic arbitration or an award from a foreign State shall*, subject to this section and section 39 be recognized as binding and enforced by entry as a judgment in terms of the award or by action.

(2) In an application under subsection (1) the applicant shall produce —

(a) the duly authenticated original award or a duly certified copy of the award; and

(b) the original arbitration agreement or a duly certified copy of the agreement.

(3) Where the award or arbitration agreement is in a language other than the national language or the English language, the applicant shall supply a duly certified translation of the award or agreement in the English language.

(4) For the purposes of this Act, *'foreign State' means a State which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958.* (Emphasis added.)

[26] Section 39 of the AA 2005 states:

39(1)Recognition or enforcement of an award, irrespective of the State in which it was made may be refused only at the request of the party against whom it is invoked —

(a) where that party provides to the High Court proof that —

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; A

(v) subject to subsection (2), the award contains decisions on matters beyond the scope of the submission to arbitration;

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or B

(vii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or C

(b) (b) if the High Court finds that —

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or D

(ii) the award is in conflict with the public policy of Malaysia.

(2) If an application for setting aside or suspension of an award has been made to the High Court on the grounds referred to in subparagraph (1)(a)(vii), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security. E

[27] By 'State' in s 39, s 2 of the AA 2005 defines it to mean 'a sovereign State and not a component state of Malaysia, unless otherwise specified'. Perusing the provisions of ss 37–39 in their entirety, one glaring distinction between s 37 and ss 38–39, even without the aid of a microscopic examination, is that the express words 'an award from a foreign State' (s 38) and 'an award, irrespective of the State in which it was made' (s 39) are distinctively not found or are obviously omitted in s 37 but are specifically provided in ss 38–39 above. Sections 38–39 which relate to the recognition and enforcement of an award which includes an award from a foreign state or international award must be read as an exception to s 3 of the AA 2005. This is what the Model Law has construed to be that 'the Model Law as enacted in a given State would apply only if the place of arbitration is in the territory of that State' except the recognition of arbitration agreements and recognition and enforcement of arbitral awards vide articles 8(1) and 9, articles 35–36 of the Model Law which our ss 38–39 relate. In addition, another glaring distinction is that s 37(1)(a) of the AA 2005 provides six grounds or 'proof as stated in (i)–(vi) therein which are primarily identical to grounds or 'proof (i)–(vi) in s 39(1)(a) but a pertinent 'proof or ground in s 39(1)(a) ie vide s 39(1)(a)(vii) that 'the award … has been set aside or suspended by a court of the country (outside Malaysia) in which, or under the law of which, that award was made' is categorically omitted. (Emphasis added.) This specific provision is unequivocally referring to an F G H I

award of a foreign state or international award where the seat of arbitration is not in Malaysia that the award had been set aside or suspended by a court of that country in which or under the law of which that award was made. I find this to be an affirmative indication that the setting aside of the award is by a court of the country (outside Malaysia) in which that award was made since s 39 encompasses an award irrespective of the state which must necessarily include foreign award or international award. In *Seaford Court Estates Ltd v Asher* [1949] 2 KB 481, Denning LJ said:

> Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity … It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature.

[28] The intention of the Legislature in enacting ss 38–39 above differently from s 37 as illustrated above, to this court is not unintentional or an inadvertent omission but is intended vividly that s 37 of setting aside an arbitral award must be read in harmony with s 3 which states that the award be it domestic or international must be made where the seat or place of arbitration is in Malaysia and not outside Malaysia. For that reason, s 37 is totally silent as to any foreign state's award or international award or an award where the seat is outside Malaysia. Sections 38–39, on the other hand, which specifically provide for the recognition and enforcement of foreign state award and in addition, s 39 which makes categorical mention under s 39(1)(a)(vii) by clear analogy that the setting aside of a foreign state award, inter alia, is to be by a court of the country in which that award was made, the intention of the AA 2005 is amply clear that ss 38–39 are to be construed as exceptions to s 3 of the AA 2005 as distinct and separate from s 37 of the AA 2005. If s 37 were to include setting aside arbitral award of foreign state, as in ss 38–39 respectively, the Legislature would certainly have provided such express words in the section. The absence of such express words in s 37 indicates the unequivocal intention of the Parliament that s 37 is not applicable to arbitral award of a foreign state or international award where the seat or place of arbitration is not in Malaysia. In *Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd* [2010] 2 MLJ 23 (FC) and *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441 (FC), our Federal Court in both cases have respectively found that the seat of arbitration is the place where challenges to an award are made. Although these two cases referred to pre-AA 2005, as

submitted, I find that the same principle is applicable in the interpretation of ss 3 and 37–39 of the AA 2005 herein this case. I say so on the footing that our legislators must have been well appraised of these two decisions by our Apex Court in this issue in enacting the AA 2005. If it is intended that a challenge to an arbitral award where the seat is outside Malaysia can be entertained in our High Court, I am certain that there would be express provision to reflect such intention and to overrule such principle of law by the Federal Court. Vividly, in the absence of such an express provision, the principle of law that the seat of arbitration is the place where challenges to an award are made remains applicable and good law. Any challenge including an application to strike out or set aside an arbitral award where the seat is outside Malaysia is to be at the seat of the arbitration.

[29] In *C v D* [2007] EWCA Civ 1282; [2008] 1 All ER (Comm) 1001; [2008] 1 Lloyd's Rep 239, the facts as shown depict that the defendant was an insurer incorporated in the United States with a branch registered in England. The claimant was a United States registered corporation. The defendant issued an insurance policy to the insured which included the claimant and any of its subsidiaries, affiliates or associated companies. That policy was stated to be governed by 'the internal laws of the State of New York' and also contained an arbitration clause that 'Any dispute arising under this policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act of 1950 as amended'. Various claims were asserted against the claimant and a subsidiary for which the claimant paid damages and expenses and then applied to the defendant for an indemnity which the defendant refused. Arbitration proceedings was initiated in London and it was found in the award that the claims were covered by the policy. The defendant then applied to correct it stating, inter alia, that the tribunal's findings constituted a 'manifest disregard of New York law' and indicated its intention to apply to a Federal Court applying US Federal Arbitration Law which permitted the vacation of an award where arbitrators had disregarded the US law. The claimant then filed for injunctive and declaratory relief to restrain the defendant from relying on the New York law. The learned judge in granting the relief sought by the claimant, held that the choice of England as the seat of arbitration was determinative of the matter and that it was not permissible for the defendant to bring any proceedings in New York or elsewhere to attack the award permitted by the law of that place. The defendant appealed. The English Court of Appeal in dismissing the appeal held, inter alia, as follows:

Held —

(1) A choice of seat for arbitration had to be a choice of forum for remedies seeking to attack an arbitral award. By choosing London as the seat of arbitration, the parties had to be taken as having agreed that proceedings on the award were to be only those permitted by English law. … It could not have been intended by the parties that New York judicial remedies

could also be permitted as that would be a recipe for litigation and confusion … their agreements on the seat and the curial law necessarily meant that any challenge to any award had to be only those permitted by that Act (Arbitration Act 1996) …

(2) … In the instant case, … even if the arbitration clause itself were governed by New York law, it would not qualify as an 'agreement to the contrary', still less would it entitle the defendant to mount a challenge to the award in a country other than the seat of arbitration.

…

[30] The approach of the English Court of Appeal by reference to the English Arbitration Act 1996 is that any challenge to an arbitral award cannot be in a country other than where the seat of arbitration was.

[31] In *Corporacion Transnacional de Inversiones, SA de CV v STET International, SpA* [1999] OJ No 3573, STET, an Italian company and its Netherlands subsidiary entered into a share subscription agreement with COTISA, a Mexican corporation to purchase an interest in CITEL, a corporation which had an interest in the Cuban national telephone company. Pursuant to the arbitration clause in the share subscription agreement, STET sought rescission of the said agreement. An arbitral tribunal was constituted under the International Court of Arbitration of the International Chamber of Commerce and the arbitration was held in Ottawa. After an arbitral award was published in favour of STET, COSTISA, CITEL and others applied pursuant to the UNCITRAL Model Law to set aside or for a rehearing and the proceedings was filed in the Ontario Court where the seat of arbitration was. Although the seat of arbitration is not the issue for determination by the Ontario Court of Appeal in this case, this case is a good example that by the Model Law, it is only applicable if the place of arbitration is in the territory of the state except the recognition or arbitration agreement or recognition and enforcement of arbitral award as in art 1(2); the challenge of the arbitral award in the Ontario Court where the seat of arbitration was in Ottawa, is thus in compliance with the Model Law.

[32] The Hong Kong Special Administration Region High Court has the occasion to consider and determine the issue of the seat of arbitration in the case of *Xiamen Xingjingdi Group Ltd v Eton Properties Ltd* [2008] 6 HKC 287; [2008] 4 HKLRD 972 where Justice AT Reyes, after referring to the English cases of *A v B* [2007] 1 Lloyd's Rep 237 and *C v D* [2007] EWCA Civ 1282; [2008] 1 Lloyd's Rep 239; [2008] 1 All ER (Comm) 1001 (CA) which laid down the principle that:

> [A] n agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as to the seat of the arbitration.,

held as follows:

> The consequence of such principle is that, if the respondents genuinely believed that there was something impossible or somehow invalid about the award, it is incumbent upon them to challenge the award in the court of the seat of arbitration …
>
> Save in the plain and obvious case where an award is so incapable of performance so that to make it an order of the court would offend against a sense of justice, I do not see why this court (which by the parties' own agreement does not have jurisdiction over the substance of the dispute) should concern itself about whether it is arguable or not arguable that a contract is wholly or partly incapable of performance. That would seem to me to usurp not just the arbitrator's jurisdiction, but also the exclusive jurisdiction of the court of the arbitration seat …

[33] See also *A v R* [2010] 3 HKC 67 which reiterated the above principle on the seat of arbitration. Across the Strait, it was submitted by learned counsel for the defendant that the Singapore International Arbitration Act similarly applies the Model Law of UNCITRAL. Section 3 of the Singapore Arbitration Act provides that:

> 3(1) Subject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore.

[34] By Chapter VIII of the Model Law, it refers to article 35 on the recognition and enforcement of arbitral award and article 36 on the grounds for refusing recognition or enforcement of such award. Therefore, the Singapore High Court is seized with the jurisdiction to hear an application to strike out or any other challenges to the arbitral award where the seat was in Singapore. This is as opined by Messrs Rodyh & Davidson LPP, a legal firm in Singapore that:

> Article 34(2) of the UNCITRAL Model Law on International Commercial Arbitration … which applies through the First Schedule of International Arbitration Act ('IAA') provides that an arbitral award may be set aside by the High Court of Singapore …
>
> …
>
> Both Article 34(2) of the Model Law and section 24 of the IAA envisages that an application for the setting aside of an award where the seat of the International arbitration is Singapore is made to the Singapore High Court; it is not anticipated

that any other court wiil have jurisdiction to set aside such an award. This is in line with other Model Law jurisdictions (see: exh 'LS1 annexed to affidavit — encl 3).

[35] Learned counsel for the defendant also referred to *Redfern and Hunter on International Arbitration* (5th Ed, 2009), and submitted that it is a well-established concept in international arbitration law that the seat of arbitration is the avenue in which any challenge to the arbitral award should be mounted. The learned author explained as follows:

> 3.34 An international commercial arbitration usually takes place in a country that is 'neutral', in the sense that none of the parties to the arbitration has a place of business or residence there. This means that in practice the law of the country in whose territory the arbitration takes place, the lex arbitri, will generally be different from the law that governs the substantive matters in dispute …
>
> 3.35 This difference between the lex arbitri (the law of the place or 'seat' of the arbitration) and the law governing the substance of the dispute, was part of the jurisdicial tradition of continental Europe, but is now firmly established in international commercial arbitration.

[36] The learned author added that the *lex arbitri* is likely to extend to, inter alia, 'the form and validity of the arbitration award; and the finality of the award, including any right to challenge it in the courts of the place of arbitration'.

[37] From the Model Law perspective and the other jurisdictions which adopt the Model Law on international commercial arbitration, one clear principle which I term it as the 'entrenched principle' that the arbitration laws have accepted and adhered to is that the right to challenge the arbitral award, as distinct from the recognition of arbitration agreement and recognition and enforcement of arbitral award, ought to be in the courts of the place or seat of arbitration.

[38] Will our AA 2005 depart from that entrenched principle accepted internationally? The answer is obviously in the negative. The rationale of our AA 2005 is to achieve consistency between the international and our domestic arbitral regimes. It will be inconsistent with such intent and purpose if the AA 2005 were to depart from that internationally entrenched principle. Our AA 2005 was indeed enacted to be in consonant with the Model Law. There must therefore be harmonisation between our AA 2005 and the Model Law. It is unconceivable for the AA 2005 which bears resemblance to the Model Law to have enacted provisions inconsistent and/or contrary to the Model Law and/or the international arbitral regimes in commercial arbitration. For that reason, I do not agree with the plaintiff's contention that s 37 of the AA 2005 can be

interpreted to be applicable to set aside an arbitral award which was made at a seat outside Malaysia. Section 37 itself does not provide so. To attempt to extend the scope of s 37 as the plaintiff has contended would not only usurp the express consensus of the parties to the joint venture contract but must be seen as a violation of the AA 2005 where it does not provide specifically in s 37 with clear expression that a foreign or international arbitral award where the seat is outside Malaysia may be set aside by our High Court as well as by reference to the Model Law and the law of other jurisdiction as narrated above. Consequently. I hold that s 37 of the AA 2005 is not applicable to the arbitral award in the instant case where the seat of arbitration is in Singapore. I find that this court has no jurisdiction to entertain such an application to set aside an award where the seat of arbitration is in a foreign country. In the instant case, the Singapore High Court is the proper jurisdiction for the plaintiff to challenge the said award. The contracting parties have agreed to such process of arbitration and it must be adhered to as they have covenanted to the exclusion of any intervention by this court.

[39] The ensuing question is whether this court can invoke its inherent jurisdiction to permit the plaintiff's application under s 37 of the AA 2005 to be pursued vide this OS. In the cited case of *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush & another* [2004] 2 SLR 14, Justice Woo Bik Lik has referred to article 5 of the Model Law and amplifies that the effect of it is to 'exclude any general or residual powers' given to the court of the enacting state by statutes other than the Model Law. I am of the view that our s 8 of the AA 2005 which is akin to article 5 of the Model Law as adopted by the AA 2005 should similarly be interpreted in line with the Model Law that the court should exclude its general or residual powers or its inherent jurisdiction to indirectly vary the substantive provisions of AA 2005 which does not categorically provide or intend so. The parties in the said contract had chosen Singapore as the seat of arbitration and must be taken to have chosen Singapore as the jurisdiction for any subsequent proceedings of challenge to the award. They cannot resile to depart from this entrenched principle accepted internationally relating to the seat of arbitration. Any challenge or any application to set aside such a foreign award made in a foreign state must be in the foreign state. In *Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd & Ors* [1998] 2 MLJ 20, His Lordship Mahadev Shankar JCA after referring to *Klockner Industries-Anlagen GMBH v Kien Tat Sdn Bhd & Anor* [1990] 3 MLJ 183 and *Soilchem Sdn Bhd v Standard-Elektrik Lorenz AG* [1993] 3 MLJ 68 where the courts held that the AA 1952 was meant to exclude the jurisdiction of the court and that the court cannot exercise its supervisory function over such arbitration, said at p 25:

> For the avoidance of doubt, we now categorically say that these two decisions should not be understood to have left open the possibility that the court had some other power to intermeddle in the arbitrations at the centre whether by way of inherent jurisdiction or at common law or otherwise.

[40] I do not see any variance in this aspect in the AA 2005. Inherent jurisdiction should not be used to intermeddle with the jurisdictional aspect of arbitration. The seat or place of arbitration is intended and contractually agreed upon by the contracting parties herein to be in Singapore. It is not the role and function of this court to rewrite their contract to alter their contractual consensus by converting the seat from Singapore to Malaysia for purpose of this OS which this court is not empowered under the AA 2005 to do. When the seat in Singapore is the consensus of the parties, it is unequivocal that the setting aside of the said award must rightly be in Singapore. As stated above, under article 34(2) of the UNCITRAL Model Law on International Commercial Arbitration, the High Court of Singapore has the jurisdiction to set aside an arbitral award where the seat is in Singapore. This is the entrenched principle accepted internationally. The avenue is therefore available to the plaintiff and there is no injustice to the plaintiff as they can make the necessary application to the court in Singapore in line with what the parties had covenanted. The plaintiff's remedy is clearly unaffected. Fundamentally, for the sake of argument even if this court were to have such power, when no question of injustice has arisen, no inherent jurisdiction can be invoked; see *Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178 (SC). However, to reiterate, this court should not exercise any general or residual powers to intervene in arbitration matters; see *Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd & Ors*; The Arbitration Act 2005 UNICTRAL Model Law as applied in Malaysia by Sundra Rajoo at p 33.

CONCLUSION

[41] For the foregoing reasons, I agree with the submission by learned counsel for the defendant that the plaintiff's application vide this OS pursuant to s 37 of the AA 2005 cannot be maintainable for want of jurisdiction since the seat of arbitration is not in Malaysia but in Singapore. Section 37 of the AA 2005 is applicable to arbitral award where the seat is in Malaysia but not where the seat is outside Malaysia. This court further finds that the inherent jurisdiction of the court ought not to be invoked to intermeddle with the jurisdictional aspect of arbitration nor to allegedly do justice in this instant case where there is no injustice as the plaintiff is at liberty to apply to the Singapore High Court to set aside the award made in Singapore. Consequently, I hold that it is a plain and obvious case that the OS in this case ought to be struck out pursuant to O 18 r 19(1)(a)–(b) and (d) of the RHC 1980 for obvious reason that it is unsustainable in law; see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36. The defendant's

application vide encl 6 is therefore allowed and I order that this OS No 24–2292–12 of 2011 dated 6 December 2011 (encl 1) is struck out forthwith with costs of RM20,000.

Defendant's application allowed and originating summons struck out with costs.

Reported by Ashok Kumar